

CHOW KIM LAN v. PUBLIC PROSECUTOR A

[A.Cr.J. (Yong J.) December 5, 1965]

[Alor Star — Kedah Criminal Appeal No. 35 of 1965]

Criminal Law and Procedure — Binding over to keep peace — Necessity to call upon person to show cause — Criminal Procedure Code (Cap. 6), ss. 66A, 67 and 173A(ii)(b).

In this case the learned magistrate found the accused guilty of voluntarily causing hurt under section 323 of the Penal Code and he ordered her to pay compensation to the complainant and bound her over under section 173A(ii)(b) of the Criminal Procedure Code. He also bound the complainant and her witness to keep the peace for six months without first giving them an opportunity to show cause.

Held: (1) it is imperative that the complainant should have been called upon to show cause and only upon her failure to do so, could the court have ordered her to execute a bond to keep the peace;

(2) the learned magistrate had acted contrary to the provisions of the Criminal Procedure Code and therefore the order for binding over of the complainant and her witness must be set aside.

CRIMINAL APPEAL.

O. L. Phipps for the appellant.

Wan Ismail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yong J.: This is an appeal by the complainant against the order of the magistrate in Kulim Magistrate's Court Summons Case No. 464 of 1965 in which the learned magistrate found the accused guilty of voluntarily causing hurt to the complainant under section 323 of the Penal Code, ordered her to pay to the complainant the sum of \$43.50 as compensation and bound her over under section 173A(ii)(b) of the Criminal Procedure Code. He also bound the complainant and her witness Tan Siew Keok (f) to keep the peace for 6 months without first giving them an opportunity to show cause.

Under section 66A of the Criminal Procedure Code it is imperative that the complainant should first be called upon to show cause and only upon her failure to do so, could the court order her to execute a bond to keep the peace.

Similarly under section 67, whenever it appears to a magistrate that any person residing or being within the local limits of his jurisdiction is likely to commit a breach of the peace, such magistrate may require such person to show cause and upon her failure to do so, the magistrate may then order her to execute a bond to keep the peace for a period not exceeding 6 months.

The learned magistrate in this case has acted contrary to the provisions of the Criminal Procedure Code and his order binding over the complainant and her witness Tan Siew Keok (f) to keep the peace is hereby set aside.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.*

RAHMAH v. BATCHA

[O.C.J. (Ismail Khan J.) December 8, 1965]

[Seremban — Civil Suit No. 10 of 1963]

Damages — Personal injury — Leg — 1½" shortening — Permanent limp.

Negligence — Liability — Accident caused in avoiding buffalo crossing road — Damages.

C The plaintiff claimed damages for injuries received by her as a passenger in a motor car, driven by the defendant. It appeared that the accident was caused when the defendant tried to avoid running into a buffalo which was crossing the road. The plaintiff suffered a compound fracture of the left femur.

Held: (1) on the evidence the court was satisfied that the defendant, after having seen the buffaloes when they were some distance away failed to proceed at a speed which would have enabled him to pull up almost abruptly when one of them cut across the path of the car and therefore the defendant was negligent;

(2) in the circumstances a sum of \$8,000 would be a fair compensation under the head of general damages.

Cases referred to:—

(1) *Parkinson v. Liverpool Corporation* [1950] 1 All E.R. 367.

(2) *Sutherland v. Glasgow Corporation* [1949] Sc. L.T. 388 at p. 391.

(3) *Kayser v. London Passenger Transport Board* [1950] 1 All E.R. 231.

CIVIL SUIT.

V. C. George for the plaintiff.

N. A. Majoribanks for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: The plaintiff suing by her next friend claims damages for injuries received by her as a passenger in a motor car M 9730. The car was driven by the defendant when it met with an accident at the 11th mile, Labu Road, at 8 p.m. on 24th December, 1961.

G In her statement of claim she claims that the accident was due to the negligent driving of the defendant. This is denied in the defence wherein it is alleged that the injuries arose from inevitable accident.

H It is not in dispute that the plaintiff was one of the passengers in the car at the time of the accident which occurred at the 11th mile when the defendant was driving to his house at Kubang Estate, Nilai.

I In her evidence the plaintiff said that it was drizzling a little at the 11th mile and there was a buffalo on the right side of the road about 100 yards away. At this point there was a straight stretch of road. There was no other traffic. After passing a culvert she saw a

buffalo crossing the road, 30 feet in front of the car. The defendant swerved to the left to avoid it. The car went on to the grass verge and continued until it crashed into a tree. She became unconscious and recovered in the hospital. Before that she had heard a bang.

According to the defendant, he saw a herd of buffaloes grazing on the grass verge on his right about two or three chains ahead. There was also an oncoming car with its head lights on which, however, did not disturb his vision. Both cars then dipped their lights. After passing the other car the defendant switched on his head lights. He then saw a buffalo moving fast across the road about 30 feet away in front. He cut his steering to the left and applied his brakes. The car slipped and he released the brakes. He was able to avoid the buffalo, but the car knocked down a mile stone by the side of the road and went off it until it hit a tree.

The police corporal who arrived at the scene shortly after found the car against a tree and the mile stone. He prepared a plan showing the respective positions of the car and mile stone.

It was submitted for the defence that as it is common ground between the parties that what the defendant did was in order to avoid running into the buffalo which had crossed his path only a few feet away, he was not guilty of negligence. The case of *Parkinson v. Liverpool Corporation*,⁽¹⁾ was cited in support of this submission. In that case the driver of an omnibus said he saw a dog some twenty yards away. It appeared that it wanted to cross the road in front of him. The dog having cleared the vehicle suddenly came back across the front of the bus. When the driver realised what the dog was going to do, it was some five or six yards away, he applied his brakes and stopped the bus. The driver's evidence was accepted and it was held that faced with an emergency caused by the dog's appearance the driver acted as an ordinary, reasonable, careful driver would have acted in the circumstances of that particular emergency, and that he was not guilty of negligence or failure to take due care of his passengers. That decision was based on the particular circumstances of the case.

It is, however, not easy to extract from the cases any general statement of the law. As the Lord Justice-Clerk said in the case of *Sutherland v. Glasgow Corporation*,⁽²⁾ at page 391:—

"In the course of an interesting debate we ranged over a number of topics connected with the difficulties the drivers of vehicles may be placed in by the presence of animals on roadways. As the problems which may arise are infinitely various, I am averse to attempting any general statement of the law. This is one of the occasions when one is well justified in saying that each case must depend on its own facts."

A It seems to me that the instant case can be distinguished. Here the defendant was not faced with a sudden emergency. He knew the road was wet and was aware of the presence of buffaloes, when he was still two or three chains away. He should have anticipated the likelihood of any of the buffaloes suddenly moving on to the road and should have slowed down to a pace that would have enabled him to stop almost immediately should he be confronted with such a situation. The case more in point is *Kayser v. London Passenger Transport Board*,⁽⁸⁾ where Humphreys J. said at page 233:—

C "The law must be, and I hold that it is, that, where a driver is satisfied that persons who are lawfully entitled to cross the road — whether they are on a pedestrian crossing or not — are well out of any danger from him if he goes on in the normal course, he is perfectly entitled to go on, but, of course, only at such a pace as will enable him to stop almost immediately in the unlikely happening of those persons doing something dangerous and negligent themselves."

D In the present case I am satisfied that the defendant after having seen the buffaloes when they were some distance away, failed to proceed at a speed which would have enabled him to pull up almost abruptly, when a buffalo did something dangerous, when it cut across the path of the car. There is evidence that the car knocked down the mile stone at the road side. This stone was found some distance from its original position and the car itself had travelled for a distance of 70 feet and was only arrested in its course when it hit the tree. I hold and find as a fact that the defendant was negligent.

F As to damages, I allow the plaintiff the agreed sum of \$1,250 by way of special damages.

G With regard to general damages, the plaintiff sustained a compound fracture of the left femur. She was in hospital for three months. Dr. Aalders who examined her on 26th June, 1962, had an X-ray taken which showed an old fracture of the upper one-third and lower two-thirds of the shaft of the femur with forward displacement of the upper fragment resulting in the union of the posterior aspect with the anterior aspect of the lower fragment. There is thus a shortening of the whole limb by 1½ inches. She would have a permanent limp. The alteration of the line of stress and weight bearing has produced osteoarthritis in the hip and knee joints which was confirmed by X-ray taken on 28th May, 1965. There is the possibility of other joints being affected in the future, joints of the lumbar spine.

I The plaintiff is a school girl about 15 years old. She is now in the secondary school. There is no doubt she has suffered pain and discomfort during her treatment. Her injuries have resulted in permanent disablement and she will not be able to take part in athletics normally indulged in by school children of her age. I do not think

that her physical handicap would prejudice the prospect of a suitable marriage in the community to which she belongs, as suggested by counsel.

Taking all the relevant circumstances into consideration, I would assess a sum of \$8,000 as a fair compensation under the head of general damages.

There will be judgment for the plaintiff in the sum of \$9,250 and costs. The money to be paid into court to be dealt with on further application.

Judgment for the plaintiff.

Solicitors: *H. W. Tan & George; Lovelace & Hastings.*

KWEK HOW BOK v. LEE SIN KWENG

[O.C.J. (Winslow J.) December 9, 1965]

[Singapore — Suit No. 1305 of 1965]

Damages — Personal injuries — Leg — ½" shortening — Compound fracture of tibia and fibula.

Negligence — Duty of a following driver — Contributory negligence — Apportionment of blame — Damages.

This was a claim for damages for personal injuries sustained in an accident arising from a collision between a taxi driven by the defendant and a motor cycle ridden by the plaintiff. On the facts it appeared that the plaintiff was riding this motor cycle and following the taxi driven by the defendant. The taxi suddenly stopped and the motor cycle then knocked against the taxi.

Held: (1) a following driver should as far as reasonably possible take up such a position and drive in such a fashion as will enable him to deal successfully with all traffic exigencies reasonably to be anticipated but the question whether he has fulfilled this duty is a question of fact which must depend on the circumstances of the particular case;

(2) in this case on the facts both the plaintiff and the defendant were equally to blame for the collision and therefore the plaintiff was entitled to half the agreed general damages and half the special damages.

Cases referred to:—

- (1) *Brown & Lynn v. Western S. M. T. Co.* [1945] Sessions Cases 35.
- (2) *Smith v. Harris* [1939] 3 All E.R. 960.
- (3) *Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291.
- (4) *Jones v. Livox Quarries Ltd.* [1952] 2 Q.B. 615.
- (5) *Swadling v. Cooper* [1931] A.C. 1.

CIVIL COURT.

Denis Murphy for the plaintiff.

Lim Cheng Pang for the defendant.

Cur. Adv. Vult.

Winslow J.: This case involves a collision which occurred at about 7.30 p.m. on 7th March 1964 between a taxi driven by the defendant along Kallang Road in the direction of the city and a motor-cycle ridden by the plaintiff which,

according to the plaintiff, was following the taxi at a distance of 10 feet.

The plaintiff claim damages as a result of injuries sustained by him, the most serious one of which was a compound fracture of the left tibia and fibula resulting in a half inch shortening of the left leg and some slight wasting in the girth of the left calf and left thigh. The fractures have since healed but there is a slight bony prominence over the antero-medial aspect of the leg.

General damages have been agreed at \$5,000.

I have to decide whether the plaintiff's claim should succeed and to determine the quantum of special damage, the largest item of which relates to loss of earnings as a coffee stall proprietor for five months at \$250 per month.

I assess the special damage at \$680, being as to \$80 cost of transport to and from the General Hospital and the cost of repairs to the motor-cycle. As to his loss of earnings I am not prepared to believe that he lost \$250 per month for five months. I do not believe the witnesses who testified to the fact that an ex-trisha rider who acted as a relief for the plaintiff was paid \$8 per day for his services. It is more likely that he was paid something in the region of at the most \$4 per day which would still have left the plaintiff, who was in partnership with another, a profit of about \$130 instead of \$250 per month.

I now turn to a consideration of the evidence in this case. In his first report to the police the plaintiff claimed that the defendant "without giving any signal turned to the side intending to stop. So I rode close to the side and as I had no time I was unable to do anything".

In his statement of claim the plaintiff alleges that "the defendant so negligently drove motor taxi No. SH.2678 along the said road and in the same direction as to cause the same to collide with the said motor cycle". The particulars of negligence set out in paragraph 2 thereof are as follows:—

- (a) Failing to keep any or any proper look out;
- (b) Driving at an excessive speed in the circumstances;
- (c) Failing to have any or any sufficient regard for other users of the highway;
- (d) Swerving suddenly to the left;
- (e) Failing to give any or any sufficient warning of his intention to turn left;
- (f) Failing to observe the presence of the plaintiff on the highway;
- (g) Failing to stop, swerve, slow down or otherwise avoid the said collision.